SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 166.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, APPELLANT,

vs.

THE UNITED STATES OF AMERICA EX REL W. G. LYNN, GUARDIAN OF ROSA LASLEY, AN INCOMPETENT OSAGE INDIAN ALLOTTEE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 *Supreme Court of the District of Columbia.*

THE UNITED STATES OF AMERICA, EX RELATIONE, W. G. Lynn, guardian of Rosa Lasley, an incompetent Osage Indian allottee, petitioner, *vs.* ALBERT B. FALL, SECRETARY OF THE INTERIOR, respondent.	At law, No. 66342.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

In the Supreme Court of the District of Columbia.

Petition.

Filed February 6, 1922.

(Title omitted.)

The petition of the United States of America, on the relation of W. G. Lynn, respectively represents to this honorable court:

1. That the said W. G. Lynn, is a citizen of the United States and a resident of the State of Oklahoma, and presents this petition as the duly appointed and qualified guardian of Rosa Lasley.

2. That Rosa Lasley, a citizen of the United States, and a resident of Osage County, in the State of Oklahoma, a duly enrolled member of the Osage Tribe, as recorded in the Department of the Interior, and known as Osage allottee No. 222, was, by the county court of Osage County, Oklahoma, having, under an act of Congress of April 18, 1912, jurisdiction of such matters, on January 27, 1919, duly adjudged an incompetent person, and on the same date the said W. G. Lynn was duly appointed and qualified as guardian of the said Rosa Lasley, and at all times since that date the said W. G. Lynn has been, and is now, the duly qualified and legal guardian of the estate of the said Rosa Lasley.

3. That the said Albert B. Fall, respondent herein, is the Secretary of the Department of the Interior of the United States, and is sued in respect to his official duties as hereinafter more particularly set forth.

4. That Congress, by an act approved June 28, 1906 (34 Stats. 539), entitled "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other pur-
2 poses," after providing for the preparation of a final roll of the Osage Tribe of Indians and a distribution of the lands among the members of the tribe, provided that the minerals underlying the surface of the Osage lands in Oklahoma should be reserved

for the tribe for twenty-five years and held in trust by the United States, and that funds derived from the sale of leases thereon, together with the royalties therefrom and certain other funds, including interest, etc., should be paid quarterly to the enrolled members of the tribe, except in the case of minors, in which case they were to be paid to the parents until the minor arrived at the age of 21. This act also authorized the Secretary of the Interior, in his discretion, upon proper showing, the issue "certificate of competency" to adult members of the tribe, entitling them to convey any of their lands excepting their homestead allotments.

5. That section 3 of an act of Congress entitled "An Act supplementary to and amendatory of the Act entitled 'An Act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma, approved June twenty-eighth, nineteen hundred and six, and for other purposes,'" approved April 18, 1912 (37 Stats. 86), provided:

"That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma."

and directed that all papers filed in such matters before said courts should be served on the superintend'nt of the Osage Agency at the time of filing, and authorized that official to appear in court for the protection of the interest of the allottee, to investigate the conduct of the guardian, and, where he found the estate being dissipated or wasted, it was made his duty to report the matter to the county court and to take such other and further action in the way of civil or criminal proceedings as might be necessary to protect the interest of the allottee and his estate.

6. That the said W. G. Lynn, as the legal guardian of the said Rosa Lasley, has, since qualify as such guardian and up until the end of the fiscal quarter, September 30, 1921, been regularly receiving, through the superintendent of the Osage Agency, the pro rata share of the said Rosa Lasley of the interest on trust funds, bonus received from the sale of leases, and the royalties received duing the previous fiscal quarter credited to the account of the Osage Tribe of Indians, and has been accounting therefor to the county court of Osage County, having jurisdiction of such matters.

7. That by an act of Congress, approved March 3, 1921, entitled "An Act to amend section 3 of the Act of Congress of June 28, 1906, entitled 'An Act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes'" (41 Stat. 1249), commonly known as the "Extension act," the minerals underlying the lands of the Osages in Oklahoma were further reserved

to the tribe and held in trust by the United States until April 7, 1946, and by that act it was further provided:

3 "SEC. 4. That from and after the passage of this act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the superintendent of the Osage Agency, and to invest the remainder after paying all the taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe: * * *"

8. That there is now due the said W. G. *Fl*ynn as guardian of the said Rosa Lasley the pro rata share of the said Rosa Lasley interest on trust funds, the bonuses received from the sale of leases, and the royalties received during the fiscal quarters ending September 30, 1921, and December 31, 1921, amounting to approximately $9,000.00 and credited to her as an enrolled member of the Osage Tribe of Indians; that the Secretary of the Interior refuses to pay over to the said W. G. Lynn, as guardian of the said Rosa Lasley, the funds now due her, as aforesaid, although such payment has been demanded of him by the relator; and the Secretary of the Interior, through his agent, the superintendent of the Osage Agency, continues to refuse to pay over to the said W. G. Lynn, guardian, the aforesaid funds held by the Interior Department to which his ward, Rosa Lasley, is entitled, or any other funds to which said ward may so become entitled in the future, unless and until the said W. G. Lynn will agree as such guardian to make no further investment in excess of $1,000.00 out of the funds of his ward, the said Rosa Lasley, in any securities other than those specified in the act of March 3, 1921, hereinbefore referred to.

9. Your relator avers that under the provisions of the Acts of Congress approved June 28, 1906, April 8, 1912, and March 3, 1921, he, as the duly appointed and qualified guardian of Rosa Lasley,

is entitled to have paid unto him by the Secretary of the Interior the fund now in the hands and under the control of the said Secretary of the Interior to which the said Rosa Lasley is now entitled, and such funds as may hereafter come into the hands or under the control of the Secretary of the Interior, derived from the sale of leases with the royalties therefrom, together with interest on trust funds accruing quarterly thereafter to which the said ward may be entitled, and that the Secretary of the Interior is without au-
4 thority to compel the investment of the said fund either in United States bonds or in Oklahoma State, county or school bonds, or to compel the placing of same on time deposit in banks in the State of Oklahoma, but that the relator has the legal right to receive such funds and invest the same for the benefit of the said ward in such securities and in such manner as may be approved by the county court of Osage County, Oklahoma, in accordance with the acts of Congress approved June 28, 1906, and April 18, 1912; and the relator further avers that the duty of the Secretary of the Interior to pay over to him as such guardian the aforesaid funds is a purely ministerial duty involving no discretion whatsoever on the part of the Secretary of the Interior or his representative, the superintendent of the Osage Agency.

10. The relator, in view of the refusal of the Secretary of the Interior to pay over to him as the guardian of the said Rosa Lasley the fund now in the hands of the said Secretary as aforesaid, is without remedy in the premises unless a remedy be granted him by this honorable court commanding the Secretary of the Interior to pay over to him the aforesaid fund, and that unless such remedy be adjudged, granted and made effectual the relator will be unable to perform his duty to his said ward by the investment of said fund for her benefit under the direction and with the approval of the said county court of Osage County, to which jurisdiction has been given as hereinbefore set forth.

Wherefore, the premises considered, your relator prays:

I. That a writ of mandamus may issue directed to the respondent, Albert B. Fall, Secretary of the Interior, commanding him to pay over to your relator, W. G. Lynn, guardian of Rosa Lasley, her pro rata share of the interest on trust funds, the bonus received from sale of leases and the royalties received by the Secretary of the Interior during the fiscal quarters ending September 30, 1921, and December 31, 1921, respectively, the said fund amounting in all approximately to $9,000.00.

II. That a rule may issue requiring the respondent, the Secretary of the Interior, to show cause, if any he has, why a writ of mandamus should not issue as herein prayed.

III. That your relator may be granted such other relief as to the court may seem proper and the nature of the case may require.

W. G. LYNN, Gdn.,
Petitioner.

JOHNSON & JOHNSON,
Fairfax, Okla.
J. W. BELLER,
CONRAD H. SYME,
Attorneys for petitioner.

(Affidavit of W. G. Lynn to above paper omitted in printing.)

5 In Supreme Court of District of Columbia.

Rule to Show Cause.

Filed February 6, 1922.

* * * * * * *

Upon consideration of the petition for mandamus herein exhibited it is this 6th day of February, 1922,

Ordered, that the defendant Albert B. Fall, Secretary of the Interior, show cause on the 17th day of February, 1922, at 10 o'clock a. m., if any he has, why he should not be by this court demanded to pay over to the relator, W. G. Lynn, guardian of Rosa Lasley, her pro rata share of the interest on trust funds, or bonus received from sale of leases and the royalties received by him as Secretary of the Interior during the fiscal quarters ending September 30, 1921, and December 31, 1921, respectively, as prayed in said petition, provided that a copy of said petition and this rule to show cause be served upon said defendant on or before the 10th day of February, 1922.

WENDELL P. STAFFORD,
Justice.

In Supreme Court of District of Columbia.

Answer to petition and return to rule.

Filed February 16, 1922.

* * * * * * *

Comes now Albert B. Fall, Secretary of the Interior, respondent in the above entitled action, and for answer to the petition herein filed as well as by way of return to the rule herein issued, says:

1–7. He admits all allegations of fact in paragraphs 1 to 7, inclusive, contained.

8. Answering the averments of paragraph 8 he says that pursuant to authority in the said act of March 3, 1921, contained, he prescribed regulations governing per capita payments to the Osage Indians on September 26, 1921, pertinent parts of which are as follows:

All enrolled adult Osage Indians having certificates of competency shall be paid all of their respective shares of bonus and royalties received during the previous quarter, after making deductions as above indicated. Payment shall also be made to Indians of this class of $500 per quarter for each of their en-
6 rolled minor children, from the income of said minors from oil and gas royalties, bonus and interest on trust funds, for maintenance and education of such minors, and such parents required to file statements with your office before the next quarterly payment that such funds were so used, although itemized statements will not be necessary.

With reference to adult Osage Indians not having certificates of competency, $1,000 shall be paid to each quarterly, so long as the income from oil and gas, and interest on their funds is sufficient to pay such amount, or full amount where less than $1,000, except where any adult Indian has a legal guardian, in which case all income available, including any amount in excess of $1,000 quarterly, shall be paid to such legal guardian. Payment shall also be made to natural guardians or parents not having certificates of competency, who actually have minor members under twenty-one years of age personally in charge, $500 only out of the income of each of said minors from oil and gas royalties and bonus and interest on trust funds. All moneys paid out in accordance with this paragraph to be expended under the supervision of the superintendent.

Payments of entire amounts due shall be made to legally appointed guardians of adults whether restricted or not, they to expend said funds under agency supervision and thereafter account for same to the County Court, as required by Oklahoma laws. Legal guardians actually having minor members personally in charge shall be paid not more than $500 quarterly out of the income of said minors.

Guardians are, therefore, restricted in the quarterly allowance for enrolled restricted adults or minors and to investments of any remainder in certain securities as designated in the act or deposited in banks to their credit.

No payments shall be made by the superintendent to legal guardians of moneys or restricted enrolled adults or of enrolled minors, unless guardians will first agree to be governed by the provisions of this act and these regulations. Payment shall be made in full of inherited shares to all adults who are not enrolled and to legal guardians of minors not enrolled, and the restrictions and provisions of this act shall not apply to such payments.

That in the administration of said statute he was required to construe said statute and did construe section 4 thereof as meaning and

intending that all quarterly payments to legal guardians, either of incompetent adults or minors, and to adults not having certificates of competency, were to be paid under the supervision of the superintendent of the Osage Agency and upon terms or conditions insuring the handling of payments so made in manner and substance not inconsistent with the purpose and terms of the said act; that he held and construed the provisions as to investment of moneys applicable to payments made to legal guardians paid under the supervision of said superintendent; that pursuant to such construction and to the regulations aforesaid the superintendent of the Osage Agency, in the exercise of his supervision over such payments, did require the relator to agree that as guardian of the said Rosa Lasley he would make no further investment of said Lasley funds save in securities specified in said act of March 3, 1921, and he admits that the said
7 superintendent, acting under said regulations, is withholding payment of said funds until the said relator will agree to make no further investment in securities other than those specified in said act.

9–10. He is advised that the allegations in paragraphs 9 and 10 amount to mere conclusions of law which he need not answer.

Wherefore, having made complete answer to the petition and return to the rule he prays that said rule may be discharged; that said petition may be dismissed with his reasonable costs and that he may be permitted to go hence without day.

ALBERT B. FALL,
Secretary of the Interior.

EDWIN S. BOOTH,
Solicitor.
C. EDWARD WRIGHT,
Attorney.

(Affidavit of Albert B. Fall to above paper omitted in printing.)

In Supreme Court of District of Columbia.

Demurrer to answer.

Filed February 20, 1922.

* * * * * * *

Comes now here the petitioner, W. G. Lynn, by his attorneys, D. E. Johnson, James W. Beller, and Conrad H. Syme, and demurs to the answer herein made by the respondent, Albert B. Fall, Secretary of the Interior, and says that said answer is bad in substance.

JOHNSON & JOHNSON,
JAMES W. BELLER,
CONRAD H. SYME.

The matters of law intended to be argued in support of the foregoing demurrer are the following:

1. That under the act of Congress of September 26, 1921, the Secretary of the Interior was without power or authority to require that the interest, shares of bonus and royalties received for adult incompetent Osage Indians, and payable to the duly appointed and qualified guardian of said Indians, should not be paid to said guardian unless said guardian would agree to invest the
8 same, over and above $1,000.00, under the supervision of the superintendent of the Osage Agency, acting by direction of the Secretary of the Interior.

2. That the Secretary of the Interior has not the power or authority, under said act of Congress, to withhold from the petitioner as guardian of Rosa Lasley, the interest on trust funds and bonuses received from the sale of leases and royalties received during the fiscal quarters ending September 30, 1921, and December 31, 1921, because the said guardian refuses to agree that he will invest said fund either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposit in banks in the State of Oklahoma.

3. That the payment by the Secretary of the Interior of said fund to the petitioner, as the legal guardian of Rosa Lasley, incompetent Osage Indian, is a purely ministerial act required by law to be performed by the Secretary of the Interior without the conditions annexed that said fund shall be invested by direction of the Secretary of the Interior under the supervision of the superintendent of the Osage Indians.

Supreme Court of the District of Columbia, Saturday, March 25, 1922.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

Order sustaining Demurrer.

Upon consideration of the demurrer of petitioner filed herein to the answer of respondent, it is ordered that it be, and it is hereby sustained.

Monday, April 24, 1922.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

In Supreme Court of District of Columbia, *Judgment, etc.*

It appearing to the court that the demurrer of petitioner filed herein to the answer of respondent was sustained on March 25, 1922; thereupon respondent by his attorney now in open court states

to the court that he does not care to amend, but will stand upon his answer.

Wherefore it is considered that the prayers of the petition be granted, that the writ of mandamus issue forthwith, as therein prayed, and that the petitioner recover of respondent his costs of suit, to be taxed by the clerk, and have execution therefor.

From the foregoing judgment the respondent by his attorney in open court notes an appeal to the Court of Appeals of the District of Columbia.

Further, upon motion of respondent, it is ordered that the issuance of the writ of mandamus be stayed until the further order of the court.

9 In Supreme Court of District of Columbia.

Assignment of errors.

Filed May 1, 1922.

* * * * * * *

The court erred

1. In sustaining the demurrer to the answer.
2. In reviewing the Secretary in his construction of a law devolving upon him to administer.
3. In failing to hold that the Secretary was justified in withholding payment to relator under proper construction of the act of March 3, 1921.
4. In failing to hold that the respondent had power and authority to withhold payment to relator save upon his agreement to invest money so received over and above $1,000 in only those bonds or securities or deposits specified in the act of March 3, 1921.
5. In failing to hold that such payments are subject to the supervision of the superintendent of the Osage Agency under rules and regulations approved by the Secretary of the Interior.
6. In awarding the writ of mandamus.

C. EDWARD WRIGHT,
Attorney for respondent.

In Supreme Court of District of Columbia.

Designation of record.

Filed May 1, 1922.

* * * * * * *

The clerk in making up the transcript of record on appeal will include the following:

1. Petition and rule to show cause.
2. Answer.
3. Demurrer to answer.

4. Notation of order sustaining demurrer.
5. Judgment awarding writ of mandamus.
6. Notation and allowance of appeal.
7. Assignment of errors.
8. This designation.

C. EDWARD WRIGHT,
Attorney for respondent.

Supreme Court of the District of Columbia.

Clerk's certificate.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 66342 at law, wherein the United States of America, ex relatione, W. G. Lynn, guardian of Rosa Lasley, an incompetent Osage Indian allottee, is petitioner
10 and Albert B. Fall, Secretary of the Interior, is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the City of Washington, in said District, this 22nd day of May, 1922.

[SEAL.] MORGAN H. BEACH,
Clerk.

L. M. G/EW.
[File endorsement omitted.]

11 In the Court of Appeals of the District of Columbia.
Thursday, October 5th, A. D. 1922.

* * * * * * *

(Title omitted.)

Argument of case.

The argument in the above entitled cause was commenced by Mr. C. E. Wright, attorney for the appellant, and was continued by Mr. C. H. Syme, attorney for the appellee, and was concluded by Mr. C. E. Wright, attorney for the appellant.

12 In the Court of Appeals of the District of Columbia.

(Title omitted.)

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

Appellee, W. G. Lynn, as guardian of Rosa Lasley, an incompetent Osage Indian allottee, filed his petition in the Supreme Court of the District of Columbia praying a writ of mandamus to compel

respondent, the Secretary of the Interior, to pay to him certain moneys belonging to his ward. To the answer of respondent, relator demurred. The demurrer was sustained, and respondent refusing to further plead, a judgment was entered from which this appeal was prosecuted.

The Osage Allotment Act of June 28, 1906, (34 Stat. 539) provided that money derived from the sale of leases upon oil lands belonging to Osage Indians together with interest, royalties, the sale and leasing of lands, etc., should be paid quarterly to the enrolled members of the tribe, except in cases of minors, when the money was to be paid to the parents.

The Osage Allotment Act was amended by Act of Congress of April 18, 1912, (37 Stat. 86), which in Section 3, provides: "That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma." The act then provides that the Superintendent of the Agency may at any time appear in court and defend the interests of the allottee and whenever the Superinten-
13 dent or the Secretary of the Interior deem it necessary they "may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma." They are further authorized to bring proceedings, civil or criminal, for "the preservation and protection of the interests of the allottee."

It was under the authority of this act that the County Court of Osage County, Oklahoma, on January 27, 1919, adjudged Rosa Lasley to be incompetent and appointed relator her guardian. As guardian he received at stated periods the funds belonging to his ward which were invested under the supervision of the County Court. In September, 1921, respondent Secretary refused to pay to relator any of his ward's funds, unless relator would agree to invest the funds in certain specified securities, basing his refusal upon section 4, of the act of Congress of March 3, 1921 (41 stat. 1249), which provides: "That from and after the passage of this act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her prorata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians,

and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage
14 Agency, and to invest the remainder after paying all the taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe.

It will be observed that the jurisdiction of the county court is clearly defined as extending to "the property of deceased and of orphan minor, insane, or other incompetent allottees." While the authority of the Secretary of the Interior and the Superintendent of the Osage Agency is with equal clearness defined. They have full power to investigate the conduct of a guardian to prevent dissipation of the estate and to take all necessary legal steps to protect the estate from waste or dissipation at the hands of the guardian.

The Act of March 3, 1921, requires the Secretary to make full payment each quarter of the funds due "to each adult member of the Osage Tribe having a certificate of competency his or her prorata share," and to incompetent adult members having legal guardians "in which case the income of such incompetent shall be paid to their legal guardians." To adult members "not having certificates of competency" the payment is limited to $1,000 quarterly, and for the maintenance and education of minors to $500 quarterly. All funds belonging to such incompetents and minors in excess of the foregoing amounts after paying taxes shall be invested under the supervision of the Secretary in one or more of the different classes of securities named in the Act.

No misconduct of the guardian is here charged, but the funds are withheld upon the refusal of the guardian to invest them in the manner prescribed by the Act of 1921. It would seem that this is a matter beyond the power and jurisdiction of the Secretary. The legal proceedings which the Secretary or Superintendent are authorized to bring to prevent waste or dissipation of an estate by a guardian, must be brought in the proper court. No power is vested in the Secretary to deprive the court of full supervision of
15 the estate and, in the absence of a statutory requirement to the contrary, to direct the guardian to invest the funds of the incompetent in such manner as to the court shall seem proper, subject always to investigation by the Secretary or Superintendent. The statute, however, is mandatory upon the Secretary, requiring him to pay the income of an incompetent member under guardianship to the legal guardian.

It is clear that the investment of excess funds, in the securities commanded by the Act, relates only to "members of the tribe, not

having certificates of competency," and to "minor members under twenty-one years of age" in charge of "parents or natural or legal guardians." On the other hand, there can be no excess funds for investment in the case of incompetents under legal guardianship, since the Secretary is required to pay the full income to the guardian. The further provision that "all payments to legal guardians and adults, not having certificates of incompetency," shall be paid under the supervision of the Superintendent of the Osage Agency," we interpret to mean that the Superintendent shall see that the funds for payment of the limited allowance to the two classes of allottees designated,—guardians of minors, and adults, not having certificates of competency, shall be delivered to the proper person. There is no reason for supervision of payment to competent allottees, since their absolute right to the full income, without restriction, is recognized. Nor is supervision of payments to guardians of incompetents necessary, since they are under the direct jurisdiction and control of the court. However, if the term "legal guardian" be construed to include guardians of incompetents appointed by the courts, the mere act of the Superintendent in seeing that the funds reach the proper destination, would not relieve the Secretary from making payment as required by the 1921 Act.

It is well settled that mandamus will not lie to control the discretion of the Secretary of the Interior, or to correct a mere error in the interpretation of a statute, under which he is vested with
16 discretionary power. Especially is this rule applicable to matters affecting the disposition of the public lands, a subject over which the law gives him general supervision and in which, of necessity, he is compelled to exercise wide discretion and judgment. Whatever discretion the Secretary may have with respect to the investment of surplus funds belonging to minors and adults, not having certificates of competency, no discretionary power is reposed in him in respect of the payment of the income of an incompetent Osage Indian to the duly appointed guardian. The duty of the Secretary to pay the full income to competent adults and to the legal guardians of incompetent adult members of the tribe, is expressly enjoined by statute. He is required to perform a plain ministerial act, without room for the exercise of any discretion whatever. The responsibility for the proper administration of the ward's estate is wholly with the court. The Secretary, therefore cannot without payment, and at the same time avoid the mandatory power of the court to compel payment, upon the mere hypothesis of a possible, though mistaken, interpretation of the scope of his authority.

The judgment is affirmed with costs.

17 In Court of Appeals of the District of Columbia.

Monday, November 6th, A. D. 1922.

* * * * * * *

(Title omitted.)

Judgment.

Appeals from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Justice Van Orsdel, November 6, 1922.

18 In the Court of Appeals of the District of Columbia.

October Term, 1922.

(Title omitted.)

Petition for Writ of Error, Filed November 21, 1922.

Now comes Albert B. Fall, Secretary of the Interior, appellant in the above entitled cause, and respectively shows that on or about the 6th day of November, 1922, this court entered a judgment herein in favor of the appellee and against the appellant affirming the judgment of the Supreme Court of the District of Columbia in favor of appellee, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellant, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellant further shows that the judgment of the Court of Appeals of the District of Columbia in this case is subject to review by the Supreme Court of the United States under the provisions of paragraph 5 of section 250 of the Judicial Code, in that the validity of an authority exercised by the appellant under the United States as Secretary of the Interior and the scope of power exercised by him as such Secretary of the Interior were drawn in question.

The appellant further shows that the judgment of the Court of Appeals is reviewable by the Supreme Court of the United States under the provisions of paragraph 6 of said section 250 of the Judicial Code, in that the construction of an act of Congress, to wit, the fourth section of the act of March 3, 1921 (41 Stat., 1249), was drawn in question by the appellant, who was the defendant
19 below, who asserted and relied upon a construction of said statute contrary to that placed thereon by the Court of Appeals in its judgment herein.

Wherefore appellant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated,

may be sent to the Supreme Court of the United States, and that the mandate of this court be stayed until further order.

ALBERT B. FALL,
Secretary of the Interior.

By his attorneys:
EDWIN S. BOOTH,
Solicitor.
C. EDWARD WRIGHT,
Attorney.

20 In the Court of Appeals of the District of Columbia.

October Term, 1922.

(Title omitted.)

Assignment of errors, filed Nov. 21, 1922.

And now comes the appellant, by his attorneys, and says that in the record and proceedings of the Court of Appeals in the above entitled cause and in the rendition of the final judgment therein, manifest error has intervened, to the prejudice of said appellant, in this, to wit:

1. That the court erred in affirming the judgment below.
2. That the court erred in reviewing the Secretary of the Interior in his construction of a statute devolving upon him to administer.
3. That the court erred in failing to hold that the Secretary was justified in withholding payment to appellee under a proper construction of the act of March 3, 1921.
4. That the court erred in failing to hold that the appellant had power and authority to withhold payment to appellee save upon his agreement to invest money received on account of his ward over and above $1,000 per quarter in only those bonds or securities or deposits specified in the act of March 3, 1921.
5. That the court erred in not holding that under a proper construction of said section 4 of said act all payments to legal guardians are to be made under the supervision of the superintendent of the Osage Agency and that the power of supervision includes authority to require the investment of surplus funds only in those
21 bonds, securities, or deposits specified in said act.
6. The court erred in failing to hold that the regulations of the Secretary promulgated by him for the administration of said act are within the scope of the act properly construed and have the force and effect of law.

Wherefore the appellant prays that for the errors aforesaid and other errors appearing in the record of said Court of Appeals in said cause to the prejudice of the appellant the judgment of said Court of Appeals may be reversed, annulled, and for naught esteemed, and

that said cause be remanded to said Court of Appeals with instructions to reverse the judgment of the Supreme Court of the District of Columbia in said cause rendered, or for such further proceedings in said cause as may be determined by the Supreme Court of the United States, to the end that justice may be done in the premises.

ALBERT B. FALL,
Secretary of the Interior.

By his attorneys:

EDWIN S. BOOTH,
Solicitor.
C. EDWARD WRIGHT,
Attorney.

22 (File indorsement omitted.)

23 In Court of Appeals of District of Columbia.

Saturday, November 25th, A. D. 1922.

* * * * * * *

[Title omitted.]

Order allowing writ of error.

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is ordered by the Court that said writ issue as prayed.

24 *Writ of error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States, To the Honorable the Justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Albert B. Fall, Secretary of the Interior, appellant, and The United States of America, ex relatione, W. G. Lynn, Guardian of Rosa Lasley, an incompetent Osage Indian, Allottee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be

done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the Twenty-fifth day of November, in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

25 *Citation and service, filed Nov. 27, 1922.*

(Omitted in printing.)
(File endorsement omitted.)

26 Court of Appeals of the District of Columbia.

Clerk's certificate.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 25, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Albert B. Fall, Secretary of the Interior, appellant, v. The United States of America, ex relatione, W. G. Lynn, guardian of Rosa Lasley, an incompentent Osage Indian, allottee, No. 3824, October term, 1922, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-seventh day of November, A. D. 1922.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsed on cover: File No. 29,284. District of Columbia Court of Appeals. Term No. 166. Albert B. Fall, Secretary of the Interior, appellant, vs. The United States of America ex rel. W. G. Lynn, guardian of Rosa Lasley, an incompetent Osage Indian, allottee. Filed December 13th, 1922. File No. 29,284.)

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

HUBERT WORK, SECRETARY OF THE Interior, *v.* UNITED STATES *ex rel.* W. G. LYNN, GUARDIAN of Rosa Lasley.	No. 166.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes up on a writ of error to the Court of Appeals of the District of Columbia; that court having affirmed a judgment of the Supreme Court of the District awarding a writ of mandamus against plaintiff in error under the following circumstances:

THE CASE.

Rosa Lasley is an adult Osage Indian not possessing a certificate of competency. W. G. Lynn was appointed guardian of this Indian by the county court for Osage County on January 27, 1919. Jurisdiction by that court, for that purpose, was taken under the act of April 18, 1912 (37 Stat. 86), section 3 of which contains the following:

> That the property of deceased and orphan minors, insane, or other incompetent allottees

> of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters be subject to the jurisdiction of the county courts of the State of Oklahoma.

On March 3, 1921, Congress passed an act (41 Stat. 1249), section 4 of which contains the following language:

> That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage Agency, and to invest the remainder after paying all taxes of

such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the beginning of each fiscal year there shall first be reserved and set aside out of the Osage tribal funds available for that purpose a sufficient amount of money for the expenditures authorized by Congress out of the Osage funds for that fiscal year: *Provided further*, That all just existing individual obligations of adults not having certificates of competency outstanding upon the passage of this Act, when approved by the Superintendent of the Osage Agency, shall be paid out of the money of such individual as the same may be placed to his credit in addition to the quarterly allowance provided for herein.

The Secretary promulgated certain rules and regulations for the administration of this act, pertinent portions being given on page 6 of the transcript of record. The particular paragraphs involved in this case are:

> Guardians are therefore restricted in the quarterly allowance for enrolled adults or minors and to investments of any remainder in certain securities as designated in the act or deposited in banks to their credit.
>
> No payments shall be made by the superintendent to legal guardians of moneys of re-

> stricted enrolled adults or of enrolled minors, unless guardians will first agree to be governed by the provisions of this act and these regulations * * *.

Defendant in error refused to be governed by these regulations. Thereupon the superintendent, acting under the authority of the Secretary, withheld payments from the guardian, who brought this action to compel payment.

The trial court, without opinion, sustained a demurrer to the answer to the petition, the ground of the demurrer being as follows:

> (*a*) Lack of power or authority in the Secretary to require a duly appointed and qualified guardian of an Osage incompetent Indian to agree to invest payments over and above $1,000 under the supervision of the superintendent; (*b*) Lack of power or authority, under said act, to withhold payments because the relator refuses to invest funds in the United States or Oklahoma State, County, or school bonds, or to place same on time deposits in banks in Oklahoma; and (*c*) That the payment of said funds to the relator is a purely ministerial act which the Secretary is required to perform without any conditions annexed.

Standing on the answer, judgment was entered awarding a writ of mandamus as prayed. (R. p. 8.) From this an appeal was taken and the Court of Appeals affirmed the judgment. (R. pp. 10–13.)

ASSIGNMENT OF ERRORS.

The full assignment appears on page 15 of the record; but the main points may be covered by these propositions:

(1) That the court erred in not holding that under a proper construction of section 4 of the act of March 3, 1921, all payments to legal guardians are to be made under the supervision of the Superintendent of the Osage Agency and that this power of supervision includes authority to require investment of surplus funds only in those bonds, securities, or deposits specified in the act;

(2) That the court erred in failing to hold that the regulations of the Secretary are within the scope of the act properly construed and have the force and effect of law;

(3) That hence the court erred in failing to hold that the Secretary had authority to withhold payment upon the refusal of the guardian to comply with these regulations;

(4) And that this act of the Secretary involved that element of judgment and discretion in the exercise of which the courts will not interfere.

ARGUMENT.

The court holds (R. p. 12) that it is clear that the investment of excess funds in the securities named in the act relates only to minors and to members of the tribe not having certificates of competency. It is further held that the direction that moneys are to be "paid under the supervision of the superin-

tendent," means merely that the superintendent shall see that the funds are "delivered to the proper person."

The act of March 3, 1921, was the result of a long investigation made by a subcommittee of the Indian Committee of the House of Representatives in the Osage country, and its purpose was to correct abuses incident to unexpectedly large incomes of the Osage Indians from their communal oil and gas deposits, as well as involving the extension of the time during which the leasing of mineral resources of the tribe was to continue under the supervision of the Secretary of the Interior.

The legislative history of this act is interesting. In the House, 66th Congress, 1st session, Mr. Snyder, chairman of the Committee on Indian Affairs, introduced a bill (No. 5010) which provided as follows:

> That payments of interest on trust funds and moneys derived from leases for oil and gas or other minerals due to any adult member of the Osage Tribe of Indians who has not been granted a certificate of competency may be made under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That payment of such moneys due minors shall be made only to guardians legally appointed in accordance with the laws of the State of Oklahoma: *Provided further*, That such amounts of said moneys which, in the judgment of the Secretary of the Interior, are not needed for the maintenance of the Indians may, in his discretion, be invested

> for the benefit of the Indian so long as he may deem advisable: *Provided also,* That taxes properly assessed and lawfully due may be paid directly to the officers entitled to receive the same: *And Provided further,* That no sale, mortgage, or other incumbrance of personal property of any such Indian shall be of any validity unless approved by the Secretary of the Interior or such officer as he may designate.

In the Senate (66th Congress, 2d session), another bill (No. 4039) was introduced, consisting of three paragraphs, principally designed to extend the period during which minerals were to be reserved to the tribe in common (act of June 28, 1906, 34 Stat. 539), subject to lease by the tribal council under the direction of the Secretary, to April 8, 1946. That bill did not contain the provisions of section 4 of the act of March 3, 1921. It passed the Senate January 27, 1921, and went to the House. It was referred to the Indian Committee before which the Snyder bill was pending. It was reported out February 1, 1921, with a section 4 added. This section 4 was substantially in the terms of section 4 of the act of March 3, 1921; but the provision as to payments, involved in this action, was in broader language:

> All of said quarterly payments to *adults, guardians, and minors* to be paid under the supervision of the Superintendent of the Osage Agency.

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The draft contained the provisions as to investments. The bill was sent back to the Committee which reported it out in the form in which it now appears. In lieu of the italicized words, it will be noted that the Committee had substituted:

> All of said quarterly payments to *legal guardians and adults not having certificates of competency,* to be paid under the supervision of the Superintendent of the Osage Agency, etc.

This change in language is significant. It shows, first of all, that payment under supervision means some more than that the court below concedes. If it merely means that the superintendent is to see that the quarterly payments are "delivered to the proper person," his authority or duty then and there ending, there was quite as much need for the discharge of that duty to the competent adult allottee as to anyone else. Yet the committee modified the language so as to exclude such adults. Indeed, if this were all it meant, the language was unnecessary as to any class of Indians, because, under the act of June 28, 1906, the superintendent was already charged with the duty of making these quarterly payments but without any express supervisory power. There was no obvious purpose in changing the original language unless supervision goes further than the mere payment. If it does go further, equally obvious is it that there would be some incongruity in paying out to a perfectly competent adult and yet treating him exactly as if he were not competent to do with his money as he pleased. For a "competent" Indian in the Osage

law means an individual to whom the Secretary has issued a certificate of competency under the terms of the act of April 18, 1912, *supra*. Such a certificate issues when the Secretary is satisfied of the competency of the adult to manage his own affairs. So the language was modified, we submit, to restrict supervision, whatever it means, to legal guardians and adults not having certificates of competency. No distinction is made between the guardian of a minor and the guardian of an incompetent. Whatever supervision the superintendent is authorized to exercise, it extends to a guardian in the situation of the defendant in error as well as to a guardian of an infant. Taking the view that supervision goes beyond the act of payment, it is readily conceived why such provision should be made in dealing with incompetent adults. And when it comes to locally appointed guardians, it is not unimaginable that the House Committee, in its investigations, had found conditions furnishing strong reasons for a measure of control over these guardian appointees of the local court. For example, it may well be that Congress knew that guardians were making most unwise investments of their wards' money in local real estate and that the county court was approving such stewardship and that the Interior Department was powerless. It may well be that the committee had become aware that guardians were buying real estate ostensibly for the Indians but in reality for the benefit of intriguing whites. For example, the purchase of a house at a price far in excess of its value.

It is not to be considered that the Committee was indulging itself in an idle performance. There was no occasion for saying anything about supervision by the superintendent if that simply means the handing out of so much money every quarter, entailing merely the duty of seeing that the "proper party" and not some one else should get it. As already remarked, the superintendent had been doing that for years under the act of 1906 which provided that certain moneys (interest and royalties) "shall be paid quarterly to the members entitled thereto." When once paid under that act, neither superintendent nor Commissioner nor Secretary had any further authority or power over the money except in the case where an infant's share was paid to the parent and the parent was squandering or misusing it. (*Fall* v. *United States ex rel. Mosier*, 261 U. S. 352.) One of the mischiefs to be remedied was that incompetent Indians were doing as they pleased with the money paid to them without any supervision or guidance. In 1921 Congress intended to go further. The Snyder bill shows an intent to go very far. Payments to incompetents were to be made under rules and regulations prescribed by the Secretary. The Secretary was to have the power to limit the amount and to invest the residue. The enacted bill did not go so far, Congress itself setting the limit of payable income. The Snyder bill ignored guardians of incompetents. The perfected bill recognized them but declared the sums to be paid them should be under supervision.

The trouble with the language in the bill as first reported in section 4 was that it went farther than this necessity and embraced competent adults. Moreover it spoke of payments to minors when no payments are made to minors. Consequently the Committee changed the language so that the supervision of the superintendent would extend to two classes only—all legal guardians, and the incompetent adults without guardians. What was meant by "supervision"? How far does it go? Has the Secretary carried its meaning too far—so far as to constitute his act an abuse of his authority? If our construction of the act is correct, we think not. To "supervise" means to superintend, to direct, to take charge over "with the power of direction." (*State* v. *C., M. & St. P. Ry. Co.*, 130 N. W. 802, 804; 152 Iowa, 317.) In *Great Northern Ry. Co.* v. *Snohomish County* (93 Pac. 924, 927), the court said that the words "general supervision" imply something more than a mere power to advise and suggest and that they confer authority to oversee and review the acts or to correct the errors of those over whom the right of supervision is granted. It is like the power of the Secretary over Bureau chiefs, etc., who by the several statutes act under the supervision of the Secretary of the Interior—"under the direction of the Secretary of the Interior." Control is implied. Webster says that "supervision" means "to oversee for direction; to superintend; to inspect; to inspect with authority." And finally this court

has considered it in such cases as *Stoneroad* v. *Stoneroad* (158 U. S. 240); *Orchard* v. *Alexander* (157 U. S. 372); and *Knight* v. *Land Association* (142 U. S. 161).

The guardians were to function under supervision, which is only another word for superintendence. To oversee is something more than to look at—the gaze of a bystander, a mere looker-on. To supervise, to oversee an agent's work, is of little utility unless guidance, control, or power of direction is implied.

Furthermore, "to be paid" may very well be understood in the sense of "to be expended." So far as payment directly to incompetents is concerned, this is the only reasonable meaning to be deduced. So far as the "remainder" is concerned, the superintendent will invest it in the manner prescribed in the act because the act provides that the Secretary "shall cause" that to be done. The English employed is not model English.

The subject of section 4 is "The Secretary of the Interior." He "*shall cause* to be paid * * * to each adult member * * * having a certificate of competency * * * and to the adult members * * * not having a certificate of competency * * * and to the parents or natural guardians or legal guardians of minors * * * and to invest the remainder * * *."

The Secretary "shall cause to be paid" and "shall cause * * * to invest." He is directed to *cause* to be invested just as he is directed to *cause* to be

paid. This he will do through the superintendent if the latter retains any of the allottee's money—the minor's money and the incompetent's money certainly.

It makes no difference whether the superintendent is turning over money directly to an incompetent adult or to his legal guardian. The Secretary shall cause any remainder to be invested. If the guardian has a surplus the Secretary is to cause him to invest it in certain ways. This the Secretary does through his regulations, as an instance of the supervisory power incident to payment.

Now, if there be no guardian of an incompetent adult, the superintendent may pay over $1,000 quarterly to the member—but with the right of supervision. He may require the member to pay a certain debt, for example. Under the last proviso of section 4 he may pay all just existing obligations outstanding upon the passage of the act out of the money of the individual as it may be placed to his credit in addition to the quarterly allowance—and that regardless of whether there be a guardian or not. The superintendent is to see to it that the income is used to the advantage of the incompetent adult; the surplus is to be invested in the manner stated in the act; not any other way.

The Indian without a certificate of competency but having a legal guardian Congress meant to have treated the same way. Else why say anything about supervision? The act states that the payment shall be made to the incompetent adult "except" where he

has a legal guardian "in which case the income" shall be paid to the legal guardian. It might well be argued that Congress meant here by "income" the $1,000 quarterly (or a less amount if the per capita income be insufficient to permit the $1,000 payment); that is, that Congress meant that that which would be paid to the incompetent were he without a legal guardian should be paid not to him but to his legal guardian if he had one. In that event, "the remainder," if any, would be invested as provided in that act.

The court below ruled that the Secretary must pay "the full income" to the legal guardians of incompetent adults. That is not quite so clear and simple when the history of this legislation is further considered. We have alluded to an investigation by a subcommittee of the House Committee on Indian Affairs, consisting of its chairman and other members. They were directed to make an investigation of conditions among the Indians in Oklahoma and elsewhere. They made their investigation among the Osages in May, 1920. Their report of this hearing is found in "Hearings before the Committee on Indian Affairs, House of Representatives, 66th Congress, Vol. 3, at pages 100 to 454." In the progress of the hearings the fact that few of the full bloods were saving any of the large sums of money being paid them was reverted to time and again. (See pages 173–174, 175, 182, 192, 193, 198, 199, Letter Secretary of the Interior to Chairman of the Committee on Indian Affairs, May 28, 1919, 203–204, 205–209,

217, 251, 279, 280, 286, 339, 375, and 450.) The Chairman said in his report to the full committee:

> At Pawhuska, Okla., hearings on the condition of the Osage Indians were held. On this reservation the two uppermost topics are the enormous amounts paid the Indians in gas and oil royalties and the extension of the present leasing operations from its legal obligations ending in 1931. That the first proposition demands speedy and drastic action is beyond question. The Osage Indians are to-day in receipt of royalties aggregating at least $8,000 per person per year. There is no law which enables the Government to retain for the Osage funds any portion of this vast amount, and the result is most deplorable and a wanton waste of money. This practice not only leads to excesses of every name and nature but encourages the recipients to vie with one another in that extravagance. The Government is without law or power to meet the situation and simple protests against the practice are useless and unheeded. It is demoralizing the Indians and in the end will result in absolute bankruptcy for them or for their children. (Congressional Document, 66th Congress, Vol. 1, Serial 7776, pp. 2 and 3 of the Report.)

March 1, 1921, the Chairman of the Committee on Indian Affairs, in moving the passage of this act, said:

> The Osages themselves, about 2,100 in number, full-bloods and others, are receiving this year in royalties and bonuses an average income of more than $10,000 per capita.

> There are instances where families of seven, all of whom are drawing this income, are spending it riotously and otherwise; so the law is simply modified to the extent that we are impounding a portion of the money of these Indians for their future welfare and benefit. We are providing in here that every adult Indian who is a citizen shall have all the money that is coming to him, of course, quarterly, *and every incompetent Indian* who has heretofore not only had his own $10,000 but the $10,000 of his children to do with as he likes—we are permitting him to have $1,000 quarterly and each of the minor children $500 quarterly for their maintenance, and that the balance will be impounded under the rules and regulations of the Secretary of the Interior in school and municipal bonds or put in the banks of the State of Oklahoma at such a rate of interest as will be a satisfactory rate. (Cong. Record, Vol. 60, Part 4, 66th Cong. 3d Sess., pp. 4198–99).

The attention of the court is invited especially to the language of the second sentence of this citation. The Chairman says: "We are providing" and then enumerates the provisions of the act. The term "every adult Indian who is a citizen" evidently relates to the provision in the bill for "every adult member of the Osage Tribe having a certificate of competency." These Osages and only these were to receive—to have paid over to them—all the money that was coming to them, quarterly. This disposes of the adults who "have certificates of competency." They constitute one class. The next class to which

he refers is "every incompetent Indian who has heretofore not only had his own $10,000 but the $10,000 of his children to do with as he likes—we are permitting him to have $1,000 quarterly." This is the only language applicable to adults not having certificates of competency. We think it clearly relates to all incompetent adults. The next class he mentions is "the minor children." These three classes are all to which he refers. If he had in mind that there were others he would certainly have referred to them, and he would have had them in mind if there were others, for he prepared the bill. It was within a few minutes after this statement was made that the House passed the bill under suspension of the rules. The members were guided by the statement made by the Chairman. We think it obvious that their intent—the intent of the House—was to treat all the incompetent adults alike and to limit the payment to each to $1,000 quarterly.

But the Chairman says further, after enumerating these three classes:

> We are providing * * * that the balance will be impounded under the rules and regulations of the Secretary of the Interior in school and municipal bonds or put in the banks of the State of Oklahoma at such a rate of interest as will be a satisfactory rate.

After giving a survey of the production of oil in the Osage country, the Chairman said in closing:

> Unless we grant this extension, so that these people can prepare themselves to continue in

> such a way as to afford to operate the well at a lower average rate than they now produce, when the time under the present law expires, they will pull up their casings and leave the country. *The result will be that the moneys which we hope to impound for the Osage Tribe would not be there* (p. 4199). (Italics supplied.)

The bill was of course read by the Clerk; but the House necessarily must have accepted, and undoubtedly did accept, the Chairman's construction of its anguage. Under that construction the intent was and is that the Secretary of the Interior shall cause to be invested the remainder over and above the $1,000 per quarter for incompetent adults and $500 per quarter for minor children "after paying all the taxes of such members, in United States bonds or in Oklahoma state, county or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe."

On the assurance of the Chairman that the report of the committee in favor of the bill was unanimous, it was passed on suspension of the rules. (Vol. 60, Congressional Record, 66th Cong., p. 4199.) It passed the Senate on the same day—March 1, 1921—the vote being taken by unanimous consent.

The rule is well settled that where there is doubt as to the meaning of a statute or an amendment to a bill the statements made by the chairman of the

committee having the bill in charge, or the proponent of the amendment, may be considered. (*United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318; *United States* v. *Press Publishing Co.*, 219 U. S. 1, 13.) The cases are quite numerous to the same effect.

However, if the act means that the superintendent may turn over the entire income to the legal guardian, a right of supervision is retained—i. e., power so to control that the purposes of the act would be effective. In other words, the Secretary may sanction regulations to vitalize the spirit of the enactment.

Surely Congress did not intend that an incompetent adult should enjoy the privilege of unlimited indulgence or squandering through the expedient of having a guardian. It was to strike down exactly that sort of thing that prompted Congress to supplement the provisions of the Act of 1906. If so construed the act contains within itself the means of utterly frustrating the purpose of the legislators, for every incompetent would apply for the appointment of a guardian, and by the device of getting some complacent guardian get hold of his entire income and make sure that there would be no "remainder" to impound or invest in any sort of securities.

To summarize our contentions: Congress intentionally conferred supervision on the Osage superintendent over moneys paid to incompetent adults and to legal guardians of such incompetents or of those under the disability of minority. Congress further meant that there should be a saving of some part

of the large incomes of these allottees. It was to be assumed that a competent adult would attend to that for himself. But as to the others, unless Congress did something, such Indians would have nothing when the oil and gas mining income ceased. Where the Secretary under the act retained a part of the royalty, bonus, and interest, he was to cause its investment in certain securities or deposits. If the act means that only the specified quarterly income of $1,000 of the incompetent adult with a guardian is to be paid to the guardian, the Secretary has it directly within his power to see that the balance, the "remainder," is invested as directed. But if the act means that all the royalty, bonus, and interest accruing quarterly is to be paid to a guardian of an incompetent (and the Department has been making payments on that basis) then it is the Secretary's contention and construction of the law that in paying out the money under supervision, it is within his power to direct that the guardian must conserve balances by such investments as Congress directed for the benefit of incompetent adults and minors.

Of course, it seems rather odd that a guardian, answerable to a court, should be also subject in some respects to the control of the Secretary. But the whole Indian situation is anomalous. The United States is the guardian of the Indian. A State court acts, if at all, as a Federal, rather than a State, agency. (*Parker* v. *Richard*, 250 U. S. 235.) It functions in respect to the Indian and his property under a Federal, not exclusively a State, en-

actment. In *Williams* v. *Hewitt* (181 Pac. 286) the Supreme Court of Oklahoma ruled that the estates of members of the Osage Tribe of Indians are governed by special Federal legislation and that the provisions of general State legislation do not apply. The special legislation referred to was the act of April 18, 1912 (37 Stat. 86), which authorized the Osage County Court to appoint guardians of Osage Indians in special instances. The act of 1912 must be considered in the light of any subsequent legislation such as the act of 1921. In other words, the guardian is a Federal agent handling property within Federal control subject to all legislation concerning it. It is probable that he must account to the judge of the court; and we think it is the duty of the court that he sees to it that the guardian carries out the will of the superguardian speaking through the Congress of the United States. He can give an account of his stewardship to the court. But that does not relieve the Secretary of any duty Congress has seen fit to impose upon him. Under the act of 1921, the Secretary deems it his duty to insist that the guardian shall make such investments as he may have occasion to make in the class of securities indicated in the act.

The county court has not the power over an Indian's guardian that in general it has over other guardians. For instance, any lease of land which the guardian might make is subject to the Secretary's approval—not the court's action. (*La Motte* v. *United States*, 254 U. S. 570, 577.)

The Act of 1912 interferes, in terms, with the ordinary functioning of that court in respect to transfer of title or real estate or any form of alienation. That can not be done without the approval of the Secretary.

Section 4 of the Act of 1921 is remedial, we have shown, and it "should be construed liberally to carry out the wise and salutary purpose of its enactment." (*Stewart* v. *Kahn*, 11 Wall. 493, 504.) Being for the welfare of Indians, it should be construed in the manner best to benefit them. (*United States* v. *Celestine*, 215 U. S. 278, 290; *United States* v. *Sutton*, 215 U. S. 291; *Choate* v. *Trapp*, 224 U. S. 665, 675.)

The Secretary's construction of the act lays the duty on the guardian to make investments in no way otherwise than the act authorizes, and pursuant to that construction he has approved the regulation set forth in his answer and under which the superintendent acted. We contend that the regulation is consistent with the act, wholly appropriate to its purpose, and entirely reasonable. (*La Motte* v. *United States*, *supra*, pp. 576, 577.)

We think there is no doubt as to what Congress meant. If the language had been "to be invested," its relation to "shall cause" could not be denied—and it would most certainly have justified the regulations. "The remainder," the Secretary understands, is the difference between the entire income share of the member whose incompetency or disability (as a minor) is conceded and the amount quarterly to be paid on his account, it making no difference

whether paid to the person or to his guardian. Congress was talking about a sum of money remaining after $1,000 or $500 is charged off against the quarterly share of the total income. It is immaterial who handles it—the guardian or the superintendent. At any rate the bungling language required construction, and the Secretary in administering the statute had to use his discretion and judgment, not some other person's judgment, in getting at the legislative intention. His idea may be wrong. Congress can correct it if he is not carrying out its purpose.

Involving discretion the court should not have interfered by mandamus to control the Secretary's judgment. (*United States ex rel. Alaska Smokeless Coal Company* v. *Lane*, 250 U. S. 549; *United States ex rel. Hall* v. *Payne*, 254 U. S. 343; *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683.)

We submit that the judgment below should be reversed.

C. EDWARD WRIGHT,
Attorney for Appellant.

JOHN H. EDWARDS,
Solicitor, of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 166.

HUBERT WORK, *Secretary of the Interior,*

vs.

THE UNITED STATES OF AMERICA, EX REL., W. G. LYNN, *Guardian of Rosa Lasley, an Incompetent Osage Allottee.*

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

The relator, W. G. Lynn, guardian of Rosa Lasley, an incompetent Osage allottee, filed a petition in the Supreme Court of the District of Columbia, asking for a Writ of Mandamus to require the Secretary of the Interior to pay over to him the share of the income of the Osage Tribe of Indians held by the Interior Department to the credit of Rosa Lasley.

The answer of respondent below admitted all of the

material facts alleged in the petition, and relied upon the provisions of the Act of Congress of March 3, 1921, as authority for withholding payment. To the answer of respondent, relator demurred. The demurrer was sustained, and respondent refusing to further plead, a judgment was entered awarding the writ of mandamus against the Secretary of the Interior, from which an appeal was taken to the Court of Appeals of the District of Columbia, which Court, in an opinion by Mr. Justice Van Orsdel (R., p. 10), affirmed the judgment of the lower court.

THE CASE.

Under the authority of an Act of Congress of April 18, 1912 (37 Stat. 86), the County Court of Osage County, Oklahoma, on January 27, 1919, decreed Rosa Lasley to be incompetent and appointed defendant in error as guardian. As guardian he received at stated periods up to September, 1921, the funds belonging to his ward which were invested under the supervision of the County Court. In September, 1921, the Secretary of the Interior refused to further continue these payments to the guardian unless the guardian would agree to invest the funds in certain specific securities, basing his refusal upon the alleged authority contained in Section 4 of the Act of March 3, 1921. Whereupon this suit was instituted.

ARGUMENT.

The Osage Allotment Act of June 28, 1906 (34 Stat. 539), provided that money derived from the sale of leases upon Osage oil lands belonging to the Osage Indians, together with interest, royalties, etc., should be paid quarterly to the enrolled members of the Tribe,

except in cases of minors, where the money was to be paid to the parents.

The Osage Allotment Act was amended by Act of Congress of April 18, 1912 (37 Stat. 86), Section 3 of which provides as follows:

> "Sec. 3. That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preserva-

tion and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, adminstrator, guardian, or other person in charge of the estate of the allottee and his surety, as the county court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: *Provided,* That no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents: *Provided further,* That no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior."

As stated by the learned Justice of the Court of Appeals in his opinion (R., p. 12):

> "It will be observed that the jurisdiction of the county court is clearly defined as extending to 'the property of deceased and of orphan minor, insane, or other incompetent allottees.' While the authority of the Secretary of the Interior and the Superintendent of the Osage Agency is with equal clearness defined. They have full power to investigate the conduct of a guardian to prevent dissipation of the estate and to take all necessary legal steps to protect the estate from waste or dissipation at the hands of the guardian."

Section 4 of the Act of March 3, 1921 (41 Stat. 1249) provides:

> "Sec. 4. That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a

member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge 500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage Agency, and to invest the remainder after paying all the taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe. * * *"

The Act of March 3, 1921, which does not repeal, either expressly or by implication, the Act of April 18, 1912, read in *pari materia* with the Act of June 28, 1906, and the Act of April 18, 1912, is perfectly clear and contains no ambiguity.

Section 4 of that Act provides for the payment at the end of each fiscal quarter, "of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter."

First. "To each adult member of the Osage Tribe having a certificate of competency his or her *pro rata*

share, either as a member of the tribe or heir of a deceased member."

Second. "And so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly."

Third. "*Except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians.*"

Fourth. "And to pay for maintenance and education to the parents or natural guardians *or legal guardians actually having* MINOR *members under twenty-one years of age personally* in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the superintendent of the Osage Agency, and to invest the remainder after paying all the taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe."

The *supervision* of the Superintendent of the Osage Agency, in the payment of these funds, is *restricted* to those—

> "for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge."

and to the payment to those adults not having certificates of competency for whom guardians had not previously been appointed by the court.

That this was clearly intended by Congress is further shown by the provision contained in the same section directing the Secretary—

> "to invest the remainder, after paying all the taxes of such members"

in certain designated securities. The reasoning which actuated Congress in specifying these securities in which the Secretary of the Interior should invest Indian funds is obvious. The Interior Department has no facilities for investigating the merits of miscellaneous investments, and by designating those securities which are approved by Congress, the Secretary is relieved of any responsibility in so far as such funds may be invested in the securities designated.

It will surely not be contended that there is any *remainder* after payment "to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share," nor that there is any *remainder* after payment "where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardian." This *remainder* to which the Act refers is the balance after payment "for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minor," and—

> "so long as the income is sufficient * * * to the adult members of said tribe not having a certificate of competency $1,000.00 quarterly,"

where the adult has no guardian.

There is no reason for any other construction of this Act. Any other construction would not be a "per-

missible'' construction. The duty of the Secretary of the Interior is plain and purely ministerial, the performance of which may be commanded by this court through the writ of mandamus. (Roberts vs. United States, 176 U. S. 221. Lane vs. Hoglund, 244 U. S. 174. Santa Fe Pacific Railroad Company vs. Lane, 244 P. S. 492. See also recent decision of this court in Work, *et al.* vs. U. S. *ex rel.* McAlester-Edwards Coal Company, reported in U. S. Sup. Ct. Advance Opinions, No. 262, October Term, 1922, p. 200.)

Counsel for plaintiff in error in their brief indulge in an elaborate explanation of what they believe to have been the intention of Congress in passing the Act of March 3, 1921.

They give a detailed history of the bill through Congress and quote extensively from the statement of the Chairman of the Committee on Indian Affairs of the House upon the theory that ''where there is doubt as to the meaning of a statute or an amendment to a bill the statements made by the Chairman of the Committee having the bill in charge, or the proponent of the amendment, may be considered,'' giving citations in support of this rule.

We submit there should be no doubt as to the meaning of this statute. The Act clearly provides that the Secretary shall pay over certain shares and a portion of certain other shares, and the remaining portion of the certain other shares he is to invest. If Congress had intended that the legal guardians of adult incompetents should invest their ward's funds in certain specified securities, Congress would undoubtedly have so provided; not only that the Secretary should invest, but that the legal guardians of incompetent adult Osages to whom ''the income of such incompetents

shall be paid'' should invest the same in the securities specified.

If we are to indulge in speculation as to what Congress intended, in contradiction of that which it provided in express and unambiguous terms, there will be no end to the discussion. We have a right to assume that the Congress, having been fully advised by the Chairmen of the Committees having the bills in charge as to what was sought to be remedied, enacted legislation to remedy the conditions complained of and that its intention was expressed in the language of the statute.

If we are to discuss what Congress intended, and we submit that such a discussion is wholly improper in view of the plain provision of the act, we might call attention to a bill which was passed by the House of Representatives in the last Congress, referred to the Senate Committee on Indian Affairs, and by that Committee reported out wherein this same Section Four of the Act of March 3, 1923, was proposed to be amended (H. R. 13835, Calendar No. 1237, United States Senate, reported by Chairman Spencer, February 28th, 1923). Congress adjourned March 4, 1923, without further action on the bill. On page 9 of that bill, as reported by the Senate Committee, it will be observed (lines 20 to 22, inclusive), that the provision—

> ''all of said quarterly payments to legal guardians and adults not having certificates of competency to be paid under the supervision of the superintendent of the Osage Agency,''

was stricken out, indicating very clearly that at a later date, in the light of this suit, Congress, or at least the Senate Committee on Indian Affairs of Congress, pro-

posed to eliminate from the statute the only excuse for the Government's contention in this case.

Counsel for Government in their brief (page 20) state:

> "Of course, it seems rather odd that a guardian, answerable to a court, should be also subject in some respects to the control of the Secretary. But the whole Indian situation is anomalous. The United States is the guardian of the Indian. A State court acts, if at all, as a Federal, rather than a State, agency. (Parker v. Richard, 250 U. S. 235). It functions in respect to the Indian and his property under a Federal, not exclusively a State, enactment."

Any construction of the Act of March 3, 1921, which places the guardian of this adult incompetent Osage allottee under the dual and wholly impossible supervision of both the County courts of Oklahoma and the Superintendent of the Osage Agency, is not only an "odd" construction, but is not a "permissible" construction.

The Act of 1912 provides (by Section 3) that—

> "the property of * * * incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the County Courts of the State of Oklahoma,"

and under a proviso of Section 5 of that Act—

> "no trust funds of * * * a person * * * who is incompetent shall be released and paid over ex-

cept to a guardian of such person duly appointed by the proper court and after the filing by such guardian and approval by the Court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof."

Section 6569 of the Revised Laws of Oklahoma of 1910 which controls in respect to guardians appointed by the Oklahoma Courts provides—

> "Section 6569. Investments of Proceeds. The County Court on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders, and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require."

The instant case furnishes an excellent example of how impossible it is to have this dual supervision. The guardian, having qualified and having furnished bond to faithfully perform the duties incident to guardianship, and to carry out the directions of the Court appointing him, is confronted with directions on the part of the Court to invest his ward's funds in real estate security at a profitable rate of interest, and, at the same time, receives an ultimatum from the Superintendent of the Osage Agency that, unless he will agree in writing to invest these funds in certain other securities, no further payment of his ward's funds will be made to him.

In the brief of counsel for plaintiff in error it is stated (page 21) that—

> "The county court has not the power over an Indian's guardian that in general it has over other guardians. For instance, any lease of land which the guardian might make is subject to the Secretary's approval—not the Court's action. (La Motte v. United States, 254 U. S. 570, 577.)"

This statement without explanation is misleading. The reason that County Courts have no authority to approve leases of Osage Indian lands is because the Act of 1906 specifically provides that all such leases must be approved by the Secretary of the Interior.

Counsel for Government argue that the administration of the Act of March 3, 1921, involves the discretion of the Secretary of the Interior, and cites United States *ex rel.* Alaska Smokekless Coal Company v. Lane, 250 U. S. 549; United States *ex rel.* Hall v. Payne, 254 U. S. 343; and United States *ex. rel.* Ness v. Fisher, 223 U. S. 683.

In all of those cases the relators sought to compel the action of the Secretary of the Interior with respect to the execution of instruments of title to public lands of the United States claimed to have been equitably acquired by the relators under certain stated facts, and sustain the proposition that where, in the exercise of his official duties, particularly with relation to the public lands and their acquisition, the Secretary of the Interior is called upon to interpret statutes of the United States, and where the construction he places upon them, though adverse to the relators, is a permissible one, the Court will not interfere to compel him to adopt a construction which he has thus indi-

cated to be contrary to his judgment in the execution of a duty imposed upon him by law.

It is unnecessary for us to analyze the cases above cited, because with this statement of the law and of the jurisdiction of the courts we find no fault. Our contention is, as heretofore stated, that in the instant case no room is left by the statute for any permissible construction by the Secretary of the Interior except that contended for by the defendant in error.

We submit that the judgment below should be affirmed.

JAMES W. BELLER,
CONRAD H. SYME,
D. E. JOHNSON,
Attorneys for Defendant in Error.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1924.

No. 17.

HUBERT WORK, Secretary of the Interior,

Appellant,

versus

UNITED STATES, *ex rel.*, W. G. LYNN, Guardian of ROSA LASLEY,

Appellees.

PETITION FOR RE-HEARING.

Defendant in error petitions the Court for a re-hearing in the above entitled case and for cause thereof respectfully alleges that the court committed error in its judgment and opinion of November 17th, 1924, during the present term of this Court, in the following particulars:

A. ***The Court erred in holding that the "income" to be paid W. G. Lynn, as guardian of Rosa Lasley, an adult, was limited to $1,000 per quarter.***

FIRST: There is a well established rule of this Court, and other courts of review, that a litigant will

not be permitted to try his case on one theory in the trial court, and on another theory in the Supreme Court.

—*McGahan* v. *National Bank*, 156 U. S. 218, 39 Law Ed. 403;
Johnson v. *Towsley*, 13 Wall. 72, 20 Law Ed. 485;
Rodriguez v. *Vivoni*, 201 U. S. 371, 50 Law Ed. 792;
Virtue v. *Creamery Package Co.*, 227 U. S. 8, 57 Law Ed. 393;
Potter v. *United States*, 107 U. S. 126, 27 Law Ed. 330.

In the answer of plaintiff in error (Rec., p. 6), the Secretary of the Interior pleads the regulations promulgated by him under the Act of March 3, 1921, as follows:

> "With reference to adult Osage Indians not having certificates of competency, $1,000 shall be paid to each quarterly, so long as the income from oil and gas, and interest on their funds is sufficient to pay such amount, or full amount where less than $1,000, except where any adult Indian has a legal guardian, in which case all income available, including any amount in excess of $1,000 quarterly, shall be paid to such legal guardian."

This cause was tried on that theory in the courts below. There was no issue between the parties hereto as to the amount to be paid by the Secretary of the Interior to Rosa Lasley, under guardianship. The Secretary had construed the Act of March 3, 1921, to mean that W. G. Lynn, as guardian of Rosa Lasley,

was to receive the entire income. Lynn was not objecting to this construction of the statute. The issue raised by the pleadings was whether or not the Secretary of the Interior or the County Court would control the investment of the income of Rosa Lasley after the same had been paid to the guardian as an officer of the County Court. We respectfully submit, that it was the duty of the Secretary of the Interior to construe the Act of March 3, 1921, and to determine the meaning of the word "income" therein used, and the sums to be paid to those adults under guardianship, and that the Secretary's construction of same is binding on all parties, including the courts, until such time as his construction is questioned in a proceeding brought before the courts for that purpose.

SECOND: The use of certain words in the Act of March 3, 1921, were obviously not called to the attention of the Court, which words assist greatly in determining the Congressional intent. The section reads:

> "*Sec. 4.* That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except

where incompetent adult members have legal guardians, in which case *the income* of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly *out of the income* of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage Agency, and to invest the remainder after paying all the taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in the banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe; * * *" (italics supplied).

The Act of June 28, 1906, allotting the tribal estate, provided the sources from which the allottee would receive "income". The first part of Section 4 of the Act of March 3, 1921, reiterates those sources within a few lines, and provides that the member having a certificate of competency shall receive all income from these sources. Then provides, that the adult member not having a certificate of competency shall receive $1,000 quarterly "so long as the income is sufficient." But under authority of the Act of April 18, 1912, certain incompetent adult members had the additional care and supervision of the County Court, its officers and agents, presumed to be competent persons and of

an equal intelligence with those members having a certificate of competency, and Section 4 then provided, "except where incompetent adult members have legal guardians, in which case the *income* of such incompetents shall be paid to their legal guardians". No words of limitation, but the *income* shall be paid to their legal guardians.

As to minors, the third class mentioned in the opinion of the Court, the Congress used words of limitation, not called to the Court's attention, nor discussed in the Court's opinion. After providing for those holding certificates of competency, and for incompetent adults, both with and without guardians, the section provides that minor members shall receive $500 quarterly *"out of the income* of said minors" (italics supplied). Unless the estate has been added to by inheritance, the income of an adult and of a minor Osage is the same, whether the adult has or has not a certificate of competency. When Congress required $500 to be paid a minor "out of the income of said minor", they must have referred to the income the minor would receive were he an adult with a certificate of competency, and not the $1,000 he would receive were he an adult without a certificate, because in no part of the section is there any reference made to a minor's receiving $1,000. Congress used words of limitation when they intended a limited sum to be paid, but as to incompetent adults under guardianship no words limiting the word "income" were used.

We respectfully submit that there is error in the judgment and opinion rendered by this Court on November 17, 1924, and we respectfully pray of this Honorable Court a re-hearing of said cause.

PRESTON A. SHINN,
D. E. JOHNSON,
Attorneys for Defendant in Error.

Certificate of Counsel.

I, Preston A. Shinn, one of counsel for the defendant in error, W. G. Lynn, file this petition for a rehearing of my own free volition, believing that the Court has committed error as therein stated and thereby grave injustice has been done the defendant in error. And I further certify that this petition for a rehearing is filed in good faith for the purpose of having the Court correct what I believe to be manifest error in the opinion, and the same is not filed for delay nor for any purpose not made manifest in said petition.

PRESTON A. SHINN.

2. As the duty to make such payments is plain, notwithstanding the loose framing of the statute, payment may be required of the Secretary by mandamus. P. 171.
3. But the excess, if any, of such incompetent's income over $1,000, is not to be paid to the guardian, but to be invested in the securities, or deposited at interest in the banks, prescribed by the section, for the benefit of the incompetent, under rules and regulations prescribed by the Secretary. P. 170.
4. The clause of the section requiring all "quarterly payments to legal guardians" and adults not having certificates of competency "to be paid under the supervision of the Superintendent of the Osage Agency," refers to a supervision designed to effectuate the payments specifically directed, but does not authorize the Secretary to impose a restriction as to how the money which he is directed to pay to a guardian shall be invested or deposited by the latter. P. 169.
5. Under § 3 of the Act of April 18, 1912, however, (c. 83, 37 Stat. 86), the Secretary may invoke action by the county court in respect of any matter affecting the Indian ward's estate, and is entitled to full consideration of the matter thus presented. *Id.*

52 App. D. C. 155; 285 Fed. 889, reversed.

ERROR to a judgment of the Court of Appeals of the District of Columbia which sustained the Supreme Court of the District in awarding a writ of mandamus.

Mr. C. Edward Wright, with whom *Mr. John H. Edwards*, was on the brief, for plaintiff in error.

Mr. Conrad H. Syme, with whom *Mr. James W. Beller* and *Mr. D. E. Johnson* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was a petition, in the Supreme Court of the District of Columbia, for a writ of mandamus to compel the Secretary of the Interior to pay to the relator as guardian of Rosa Lasley, an incompetent Osage Indian, her share of certain tribal income. The court sustained a demurrer

to the answer, and on the defendant's declining to plead further, a judgment was entered awarding the writ. The judgment was affirmed by the Court of Appeals, 52 App. D. C. 155; 285 Fed. 889, and the case is here on writ of error.

Rosa Lasley is an adult member of the Osage Tribe, enrolled as such, and entitled to share in the tribal income. She never was given a certificate of competency by the Secretary of the Interior. In 1919 the county court of Osage County, Oklahoma, adjudged her an incompetent person and appointed the relator her guardian. Up to the end of September, 1921, her share of the tribal income was regularly paid to the guardian; and he duly accounted therefor to the county court. But the defendant refused to make further payments unless the guardian would agree to invest the moneys in United States bonds or Oklahoma state, county or school bonds, or to place the same at interest on time deposits in Oklahoma banks. This the guardian declined to do because he believed the power to direct and control the investment of the moneys, after they were paid to him, was in the county court. Early in 1922, when the petition was filed, the income due to the ward and standing to her credit in the public accounts with the Osages was approximately $9,000, and further sums were becoming due and being so credited.

In his answer the defendant justified his refusal to pay on the ground that in administering the Act of March 3, 1921, c. 120, § 4, 41 Stat. 1249, relating to such payments, he had construed it as meaning that in the case of an incompetent adult having a legal guardian "all income available, including any amount in excess of $1,000 quarterly, should be paid to the guardian", but that the payment should, or might in the defendant's discretion, be made subject to a restriction that the

moneys be invested or deposited as already indicated; that he had given effect to that construction by adopting and promulgating regulations embodying such a restriction, and that the guardian had declined to assent to it.

Whether the construction so put on the act is right is the question for decision. Other prior and related acts have a bearing on the question.

The Osage Tribe was settled many years ago on a reservation covering all or much of what is now Osage County, Oklahoma. See c. 310, 17 Stat. 228.

By an Act of June 28, 1906, c. 3572, 34 Stat. 539, Congress adopted a plan for distributing the lands and funds of the tribe among its members. Most of the lands were to be allotted in severalty, partly as homesteads and partly as surplus land; and the remaining lands, including some town lots and buildings, were to be sold for the benefit of the tribe. The oil, gas, coal and other minerals were to be reserved to the tribe for twenty-five years and leased during that period on royalties. Certain tribal funds were to be held in trust by the United States for twenty-five years and then paid to the members. In the meantime, and as soon as practicable, these funds were to be segregated and placed to the credit of the individual members on the basis of a *pro rata* division. The amounts credited were to draw interest and the interest was to be paid to the members quarterly. The interest due to minors was to be paid to the parents, but where the Commissioner of Indian Affairs became satisfied that the parents were misusing or squandering the money further payment might be withheld, and where the parents were deceased payment was to be made to a legal guardian. The proceeds from the lands, town lots and buildings that were to be sold, together with the royalties from oil, gas, coal and other mineral leases and any money received from grazing privileges, were to be placed in the Treasury of the United States to the credit of the individual mem-

bers and, subject to deductions not material here, were to be paid to them in the manner and at the times the interest on the trust funds was to be paid. For a period of twenty-five years all members were to be regarded as without capacity to sell or dispose of the lands allotted to them, save where adults were given certificates of competency by the Secretary of the Interior on his finding, after investigation, that they were fully capable of caring for their own affairs. On the issue of such a certificate the lands of the member other than the homestead were to be taxable, and he was to have the right to manage, control and dispose of all excepting the homestead.

Some changes in the act were effected by a joint resolution of February 27, 1909, 35 Stat. 1167, and an Act of March 3 of the same year, c. 256, 35 Stat. 778, but they are without present bearing.

By an Act of April 18, 1912, c. 83, 37 Stat. 86, Congress altered the first act in some respects and supplemented it in others. The only provision then adopted and material here expressly subjects to the jurisdiction of the local county courts the estates of Osages who are deceased or are orphan minors, insane or otherwise incompetent. That provision is as follows:

"Sec. 3. That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee. The super-

intendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require," etc.

Next came the Act of March 3, 1921, with which we are particularly concerned. It enlarges the period for which the oil, gas, coal and other minerals were reserved, extends the life of all valid oil and gas leases existing at the end of the original period and changes the original plan in some other particulars. Section 4 is the important one here and reads as follows:

"Sec. 4. That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency

$1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage Agency, and to invest the remainder after paying all taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe," etc.

While this section is in some respects loosely framed, we think its purpose and meaning are reasonably plain,—particularly when it is examined in the light of the prior acts, the mischief it was intended to correct and its legislative history.

When the first act was passed it was believed that the income to be paid quarterly would not be in excess of the current needs of the members. For about ten years that proved to be true. Thereafter increased production of oil and gas under the leases that were given resulted in royalties which swelled the income to a point where the quarterly payments were greatly in excess of current needs and were leading to gross extravagance and waste. Administrative measures restricting the payments were adopted, but their validity was questioned (see *Work* v. *Mosier*, 261 U. S. 352) and the matter was called to the attention of Congress by the Secretary of the Interior. The Secretary recommended the enactment of a provision which, as respects all members other than adults

with certificates of competency, would enable him, in his discretion, to limit the payments to amounts deemed necessary for the maintenance of the members and to invest the excess for their benefit for such time and in such manner as appeared to him advisable. A bill to that effect was introduced but not passed. Instead § 4, as set forth above was enacted It evidently is designed to be comprehensive of payments to members of every class; to distinguish between such adults as have certificates of competency and such as are without them, and also between adults and minors; to cover all payments to legal guardians, whether on behalf of incompetent adults or minors, and all payments to parents on behalf of minor children; to limit the amounts to be paid where a limit is deemed advisable, and to authorize and require the investment of the excess in designated securities or time deposits. Unlike the provision that was proposed and rejected, the section is intended in itself to limit the amounts to be paid, in so far as they are to be limited, and to prescribe the manner of investing the excess. Thus it directly determines the questions which the rejected provision was intended to commit to the judgment of the Secretary.

The obviously mistaken use of the words "to pay" and "to invest" in some of the clauses instead of "shall cause to be paid" and "shall invest", or their equivalents, does not introduce any uncertainty into the section or affect its meaning. The sense is made plain by the context.

In our opinion the section must be taken as making it the plain duty of the Secretary to cause the several payments of income to be made in the amounts and at the times specified, and to invest the excess, where there is such, in prescribed securities, or to deposit it in prescribed banks, for the benefit of those to whom it is owing. The investment clause obviously refers to the moneys which

are withheld, not to those which are paid. Where the payment is to a guardian, the county court alone is empowered to direct and control the investment of what is paid. This is apparent when the section is read, as it should be, with § 3 of the Act of 1912, before quoted. Under the latter the Secretary may invoke action by the county court in respect of any matter affecting the Indian ward's estate, and, where he does, he is entitled as of right to a full consideration of the matter presented; but he can exercise no direct control over the use or investment of the money after it is paid to the guardian.

The defendant relies on the clause requiring all payments to guardians and adults without certificates of competency to be made "under the supervision" of the superintendent of the Osage Agency; but we think this clause is not intended to cut down or narrow the others and that it refers to a supervision designed to effectuate the payments specifically directed by other clauses, and gives no warrant for imposing conditions at variance with such directions. There is ample room for supervision, and also need of it, without enlarging or narrowing any clause by construction.

We hold therefore that the Secretary exceeded his authority in imposing a restriction as to how the money should be invested or deposited after it was paid to the guardian.

For the purposes of these payments the section assigns the members to three major classes. The first comprises all adults having certificates of competency, the second all adults who are without such certificates, and the third all minors. The directions for payment take up the classes in that order. As to the first the direction is that the member be paid his full share of the income. Whatever is due is to be paid. As to the other classes the directions begin with the qualifying words "so long as the income is sufficient" and then proceed to require

that specific amounts be paid. As to the third class the amount is $500 for each member, whether the payment is to his parents or to his guardian. As to the second class the direction, apart from the qualifying words just noticed, is,—" to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians."

In his answer the defendant took the position that this provision, while limiting each payment to $1,000 out of the member's share where he is without a guardian, requires that the full share be paid where he has a guardian. Afterwards the defendant changed his position and came to insist that the limit of $1,000 applies where the member has a guardian as well as where he is without one. The courts below acceded to the first position. But we are of opinion that the later insistence is right. The directions as a whole show that the personal capacity of the member is made the test of whether his full share of the income shall be paid, or only a limited amount deemed sufficient for his current needs. If he is an adult and has a certificate of competency showing he is fully capable of managing his own affairs the full share is to be paid; otherwise only a limited sum,—$1,000 where he is an adult and $500 where he is a minor. The clause saying, "except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians", is not an independent direction but merely an excepting clause showing that the income which under the principal provision would be payable to the ward is to go to the guardian. In this respect it puts guardians of members who are in the second class on the same plane that the next provision puts guardians of members who are in the third class. In both cases the guardian is to receive what would

go to the ward if he were not under guardianship, and no more. This is what naturally would be expected, and we think it is what the statute intends.

Our conclusion on the whole case is that a writ of mandamus was rightly awarded, but that instead of commanding the defendant to pay the ward's full share of the income, it should have commanded him to recognize and respect the right of the relator to be paid, without any restriction as to how the same should be invested or deposited, $1,000 quarterly out of the ward's share so long as it is sufficient for the purpose. Because of the error in that regard, the judgments of both courts will be reversed and the case remanded to the Supreme Court of the District for the entry of a judgment in conformity with this opinion.

Judgment reversed.

WORK, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. LYNN, GUARDIAN OF LASLEY, AN INCOMPETENT OSAGE INDIAN ALLOTTEE.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 17. Argued January 16, 17, 1924.—Decided November 17, 1924.

1. Under § 4 of the Act of March 3, 1921, c. 120, 41 Stat. 1249, regulating quarterly payments by the Secretary of the Interior to the members of the Osage Tribe of their income from interest on trust funds, bonuses, and royalties, the income of an adult member who has not received a certificate of competency and who has been placed under guardianship, as an incompetent person, by an Oklahoma county court, must be paid to such legal guardian, not to exceed the amount of $1,000 quarterly. P. 168.